INDEX

	Page
Opinion below	1
Jurisdiction	1
Question presented	2
Statutes involved	2
Statement	3
Argument	4
Conclusion	7

CITATIONS

Cases:

Bailey v. *United States*, 5 F. 2d 437, petition for certiorari dismissed, 269 U.S. 551	6
Braverman v. *United States*, 317 U. S. 49	5
Brown v. *Elliott*, 225 U.S. 392	5
Fiswick v. *United States*, 329 U. S. 211	5
Huff, et al. v. *United States*, 192 F. 2d 911, certiorari denied, 342 U.S. 946	6
Hyde and Schneider v. *United States*, 225 U.S. 347	5
Nyquist v. *United States*, 2 F. 2d 504, certiorari denied, 267 U.S. 606	6
United States v. *Kissel*, 218 U.S. 601	5
United States v. *Perlstein*, 126 F. 2d 789, certiorari denied, 316 U.S. 678	6

Statutes and Rule involved:

18 U.S.C. [1946 ed.]:	
Sec. 80	3
Sec. 88 (Criminal Code of 1909, Sec. 37)	2, 5
18 U.S.C. [1948 rev.]:	
Sec. 371	2, 3, 5
Sec. 1001	4
28 U.S.C. 2255	4
Rule 35, F.R. Crim. P.	4

In the Supreme Court of the United States

OCTOBER TERM, 1952

No. 223

SAMUEL GOLDBERGER AND ADOLPH KAPLAN,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (R. 64) is not yet reported.

JURISDICTION

The judgments of the Court of Appeals were entered on May 29, 1952 (R. 65-66). By order dated June 25, 1952, Mr. Justice Burton extended the time for filing a petition for a writ of certiorari to and including July 25, 1952 (R. 70). The petition was filed on July 23, 1952. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1). See also Rules 37(b)(2) and 45(a), F.R. Crim. P.

QUESTION PRESENTED

Whether 18 U.S.C. 371, which increased the penalty for conspiracy from two to five years' imprisonment, is an *ex post facto* law as applied to a conspiracy which, although commenced before, was continued by overt acts after its effective date.

STATUTES INVOLVED

Section 371, Title 18 U.S.C. [1948 revision] provides:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.
>
> If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

Section 37, Criminal Code of 1909, 18 U.S.C. [1946 ed.] 88, provided:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than $10,000, or imprisoned not more than two years, or both.

STATEMENT

On April 3, 1951, a seven-count indictment (R. 1-22) was returned in the United States District Court for the District of New Jersey, the first count of which charged petitioners and others with a general conspiracy in violation of 18 U.S.C. 371, *supra*, and its precursor, Section 37, Criminal Code of 1909, 18 U.S.C. [1946 ed.] 88, beginning on or about April 1, 1947, and continuing until July 6, 1949, to commit offenses against the United States and to defraud the United States by depriving it of its money and property, by corrupting and deceiving its officers and employees, by depriving it of the honest and efficient services of certain of its officers and employees, and by circumventing, defeating and frustrating the safeguards and inspection processes established by the Department of the Army for its protection in purchasing of meat products (R. 1-9).[1] Nine overt acts were alleged to have been committed in furtherance of the conspiracy, four of which occurred prior to September 1, 1948, the effective date of Section 371, and five on or about that date and thereafter (R. 7-8). Each petitioner was alleged to have participated in one of these last five overt acts.

In addition to the conspiracy count, petitioners and others were charged in six other counts with substantive offenses in violation of 18 U.S.C. 80 [1946 ed.], relating to the making of false claims

[1] Section 371, effective September 1, 1948 (Sec. 20, 62 Stat. 862) is a reenactment of the old Section 37 of the Criminal Code except that the penalty was increased from two to five years' imprisonment.

against the United States, and 18 U.S.C. 1001, pertaining to the making of false statements to departments or agencies of the United States (R. 9-22).

On November 7, 1951, petitioners pleaded guilty to the conspiracy count of the indictment (R. 25-27), and on January 4, 1952, each of the petitioners was sentenced to three years' imprisonment, and was fined the sum of $5,000 (R. 39-41). The remaining six counts of the indictment, on the Government's motion, were dismissed both as to petitioners and the other defendants (R. 38, 42).

On January 10, 1952, petitioners moved to correct the judgments and sentences on the grounds that the sentences imposed were greater than that authorized by law (R. 37).[2] At the hearing on the motion, petitioners contended that the indictment, properly construed, charged an offense under 18 U.S.C. 88 [1946 ed.], for which the maximum sentence was two years, and that sentence under 18 U.S.C. 371 violated the constitutional prohibition of *ex post facto* laws (R. 44-62). This motion was denied by the court (R. 59-60). On appeal, the Court of Appeals in a *per curiam* decision affirmed the judgments of conviction (R. 64).

ARGUMENT

Petitioners' sole contention is that the application in this case of the increased penalty provision of 18 U.S.C. 371 violated the constitutional prohibition of *ex post facto* laws (Pet. 5-13). They do not

[2] See Rule 35, F.R. Crim. P., and 28 U.S.C. 2255, which permit a motion to correct an illegal sentence to be made at any time.

deny that the conspiracy continued past September 1, 1948, the effective date of Section 371, and that overt acts in furtherance thereof were committed by them after such date. Rather, the essence of their argument is that, as a single conspiracy can constitute only one offense (*Braverman* v. *United States,* 317 U.S. 49), and as all necessary elements of the offense were completed and indictable upon the commission of the first overt act, the punishment must be fixed as of that time. Here, therefore, petitioners argue that, since the conspiracy was completed by the overt act committed on or about December 20, 1947, they should have been punished by the penalty of 18 U.S.C. 88 (1946 ed.).

It has, however, long been settled that conspiracy is a continuing offense. *Hyde and Schneider* v. *United States,* 225 U.S. 347. See also *Fiswick* v. *United States,* 329 U.S. 211, 216; *United States* v. *Kissel,* 218 U.S. 601, 607.[3] By their own admissions of guilt, after the effective date of Section 371, petitioners participated in certain overt acts as alleged in the indictment, which furthered the conspiracy. Hence, all elements of the offense of conspiracy—the agreement and overt acts in furtherance thereof—were continued after the 1948 amendment, and petitioners were thus punished under that law for a subsequent, and not a prior offense.

---

[3] Because the offense is continuous, the statute of limitations runs from the last overt act during the existence of the conspiracy. See *Fiswick* v. *United States, supra,* at 216; *Brown* v. *Elliott,* 225 U.S. 392, 401.

This same question was raised on almost identical facts in *Huff, et al.* v. *United States,* 192 F. 2d 911 (C.A. 5), certiorari denied, 342 U.S. 946. There, after commenting upon the reasoning in the decisions of this Court, cited above, the Court of Appeals stated (p. 915):

> * * * we hold that a statute imposing a greater penalty for a conspiracy, where the crime is still being carried on and continued after the date when the act becomes effective, does not violate the constitutional inhibition of *ex post facto* laws.

See also *Nyquist* v. *United States,* 2 F. 2d 504 (C.A. 6), certiorari denied, 267 U.S. 606, where a conviction under the Dyer Act on a charge of conspiracy to transport stolen automobiles was upheld although the conspiracy was entered into before the passage of that act, but continued thereafter. To the same effect, on substantially the same facts, is *Bailey* v. *United States,* 5 F. 2d 437 (C.A. 5), petition for a writ of certiorari dismissed, 269 U.S. 551, 589. Similarly, in *United States* v. *Perlstein,* 126 F. 2d 789 (C.A. 3), certiorari denied, 316 U.S. 678, a conviction for conspiracy to obstruct justice was upheld where the agreement was formulated before, but continued after the judicial proceedings which it was designed to obstruct were begun, although it was not an offense to conspire to obstruct non-existent proceedings.

CONCLUSION

For the foregoing reasons, it is respectfu
mitted that the petition for a writ of ce
should be denied.

ROBERT L. STERN,
Acting Solicitor Ge
JAMES B. MURRAY,
Assistant Attorney Ge
BEATRICE ROSENBERG
JAMES T. KELLS,
Atto

AUGUST 1952.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1952